

NO. SC84149

IN THE MISSOURI SUPREME COURT

EDWARD WILKES,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

**APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, DIVISION VIII
THE HONORABLE LEE E. WELLS, JUDGE**

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from the denial of a motion to vacate sentence and judgment under Supreme Court Rule 29.15 in the Circuit Court of Jackson County. The conviction sought to be vacated was for one count of second-degree murder, §565.021, RSMo 2000, one count of first-degree assault, §565.050, RSMo 2000, and two counts of armed criminal action, §571.015, RSMo 2000, for which the sentence was life on the second-degree murder and first-degree assault charges and fifty years on each armed criminal action charge, all in the custody of the Missouri Department of Corrections. The murder sentence and one armed criminal action charge are to be served concurrently, and the assault sentence and the second armed criminal action sentence are to be served concurrently with each other and consecutive to the murder and first armed criminal action counts. Jurisdiction in this case is proper because this Court granted transfer in this case after opinion by the Missouri Court of Appeals, Western District, pursuant to Article V, §10, Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

Appellant, Edward Wilkes, was convicted by a jury of one count of second-degree murder, one count of first degree assault, and two counts of armed criminal action (D.L.F. 66).¹ Appellant was charged with the above-listed offenses by indictment (D.L.F. 1-2). Appellant was brought to trial on June 1, 1998, in the Circuit Court of Jackson County, the Honorable Lee E. Wells presiding (D.Tr. 13). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial.

In late 1995 and early 1996, appellant was living with his girlfriend, Amy Noel Fields, and their five-year-old son, Canon, in Topeka, Kansas (D.Tr. 379-380). Fields owned a light blue four-door 1989 Ford Escort LX (D.Tr. 380). Appellant and Fields were acquainted with Kenneth Moore and Gary Singleton (D.Tr. 380). Appellant, Moore and Singleton had played dominoes together at Fields' house (D.Tr. 381).

In early 1996, Fields was experiencing problems with the fan belt squeaking on her car (D.Tr. 382). On February 1, 1996, Fields went to work at The Kelly House, a group home for people with Alzheimer's disease (D.Tr. 384). She worked from 3:00 P.M. to 12 midnight (D.Tr. 384). Around 5:30 or 6:00 P.M., appellant called Fields at work and asked to borrow her car (D.Tr. 385). Appellant told Fields he was going to Lawrence, Kansas,

¹References to the record are as follows: D.Tr. is the direct appeal transcript, D.L.F. is the direct appeal legal file, and PCR L.F. is the post-conviction legal file

with another person (D.Tr. 385). Appellant picked up Fields' car and left another car for her to drive while he was gone (D.Tr. 386, 387).

That same day, Kenneth Moore and Gary Singleton were working at Joe's Unlimited Auto, a detail shop in Kansas City (D.Tr. 176-177). The employees of Joe's Unlimited were getting ready for World of Wheels, a car show that was being held at Bartle Hall in Kansas City (D.Tr. 177, 347). Later that evening, Moore, who was driving a blue Toyota, picked up Singleton and they drove to Bartle Hall (D.Tr. 179, 181, 183). They parked behind Bartle Hall, in front of the back entrance (D.Tr. 184). The two men sat in the car while Moore talked on a cell phone (D.Tr. 185, 188). Sometime after 10:30 p.m., a light blue Escort pulled up and parked nearby (D.Tr. 189, 222-223). Singleton got into the back seat to retrieve some candy under the seat (D.Tr. 189, 191). As Singleton was retrieving the candy, appellant, along with another man, came up to the door, said "Hey, man" and began shooting (D.Tr. 191). The first shot entered Moore's head and killed him (D.Tr. 191, 192, 196, 358). Singleton saw appellant coming toward him with a gun (D.Tr. 192, 196). He hit the gun and it went down (D.Tr. 192, 197). As the gun came back up, a second shot entered Singleton's left chest (D.Tr. 192, 197, 220). Singleton looked directly at appellant, and then closed his eyes and played dead (D.Tr. 193, 197).

When Singleton opened his eyes after an undetermined amount of time, he saw appellant get into a light blue Escort and drive away (D.Tr. 197-198, 282). Singleton retrieved Moore's cell phone and made calls to his sister and Moore's mother (D.Tr. 198-199). A police officer at the scene observed a bullet come out of Singleton's back (D.Tr.

199, 229). Singleton had four or five surgeries and remained hospitalized for a month (D.Tr. 200).

Early the next morning, February 2, Fields received a phone call from appellant around 2:30 A.M. (D.Tr. 388-389). Appellant told Fields he was at a gas station getting her fan belts fixed (D.Tr. 389). Fields noted from her Caller I.D. that appellant was in the 816 area code, which is Kansas City (D.Tr. 392-393). Appellant returned to Fields' house at approximately 4:15 a.m. (D.Tr. 394). The next day Fields noticed that the fan belts were still broken on her car (D.Tr. 394).

That same day, while cleaning out her car, Fields noticed two "yellowish copper color" bullets in the glove compartment of her car (D.Tr. 394-395). Fields had never seen bullets in her car before (D.Tr. 420). Fields closed the glove compartment without removing the bullets (D.Tr. 395, 419-420). Fields asked appellant about the bullets but he denied any knowledge of the bullets (D.Tr. 396, 423). Fields never saw the bullets again (D.Tr. 397).

On February 2, appellant told Fields "if anyone calls for me, tell them you haven't seen me" (D.Tr. 437). Several days later, on February 8, appellant left Fields' house and went to Atlanta (D.Tr. 427, 433). After an investigation by the Kansas City Police Department in which Singleton identified appellant from a photospread, appellant was arrested in Atlanta, Georgia in October, 1996 (D.Tr. 208, 483-485).

At trial, appellant did not present any evidence. At the close of all the evidence, and following arguments of counsel and instructions to the jury, the jury returned a verdict of

guilty on all four counts (D.Tr. 606-607, D.L.F. 52-56, 57). Appellant was sentenced on August 4, 1998, according to the jury's recommendation, to life in prison for second degree murder and a concurrent term of fifty years for armed criminal action, to be served consecutively to a second term of life in prison for first degree assault and a concurrent term of fifty years for armed criminal action (D.Tr. 622-623).

Appellant appealed his convictions to the Missouri Court of Appeals, Western District, and that court affirmed the convictions on September 14, 1999. State v. Wilkes, No. WD56304 (Mo.App., W.D. September 14, 1999)(memorandum opinion). The mandate issued on December 23, 1999 (PCR L.F. 33).

Appellant then filed a *pro se* 29.15 motion on March 3, 2000 (PCR Tr. 1-10). Appellant, through counsel, filed an amended motion on June 13, 2000 (PCR L.F. 13-28). The motion court, the Honorable Lee. E. Wells presiding, denied appellant's motion without an evidentiary hearing on January 18, 2001 (PCR L.F. 32-35). Appellant timely appealed the denial of his Rule 29.15 motion to the Missouri Court of Appeals, Western District, and that court affirmed the motion court's ruling. Wilkes v. State, No. WD59694 (Mo.App., W.D. Oct. 23, 2001). This Court then granted transfer on January 22, 2002.

ARGUMENT

I.

THE MOTION COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT'S 29.15 MOTION CLAIMING THAT TRIAL COUNSEL WAS INEFFECTIVE FOR ALLEGEDLY FAILING TO CALL RUSSELL HOWARD AS A WITNESS BECAUSE APPELLANT FAILED TO PLEAD SUFFICIENT FACTS WHICH IF TRUE WOULD ENTITLE HIM TO RELIEF IN THAT HE DID NOT PLEAD THAT RUSSELL HOWARD WAS AVAILABLE TO TESTIFY AT TRIAL OR WHAT HE WOULD HAVE TESTIFIED TO.

Appellant contends that he should have received an evidentiary hearing on his claim that his counsel was constitutionally ineffective for failing to call Russell Howard as a witness at trial (App.Br. 18).

1. The motion court's ruling

The motion court ruled as follows:

Regarding the allegation that trial counsel failed to investigate and call potential defense witnesses, the Court finds that the movant was not prejudiced due to the fact that "conjecture or speculation as to the potential testimony of a witness is not sufficient to establish the required prejudice." State v. Buzzard, 909 S.W.2d 370 (Mo.App, S.D. 1997). * * * Finally, the Court finds that whether or not "to call a witness is a matter of trial strategy and not the basis for overturning a conviction unless the movant clearly

establishes otherwise.” State v. King, 865 S.W.2d 845 (Mo.App., W.D.1993); Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). In the present matter by no means has the movant established otherwise. Accordingly, the above point is hereby overruled.

(PCR L.F. 33-34).

2. Standard of Review

The standard of review for denial of a 29.15 motion is clear error. “Appellate review of the denial of a post-conviction motion is limited to a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous. Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made.” Moss v. State, 10 S.W.3d 508, 511 (Mo. banc 2000).

To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two pronged Strickland test. Appellant must show that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances, and that he was prejudiced as a result. State v. Link, 25 S.W.3d 136, 149 (Mo. banc 2000), cert. denied 531 U.S. 1040 (2000), citing State v. Clay, 975 S.W.2d 121, 135 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999) and Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice, appellant must show that there is a “reasonable probability that, but for counsel’s

errors, the result of the proceeding would have been different.” Link, supra, at 149, quoting State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993). A reasonable probability under Strickland is “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

“In order to be entitled to an evidentiary hearing, a movant must 1) cite facts, not conclusions, which, if true, would entitle movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant.” State v. Blankenship, 830 S.W.2d 1, 16 (Mo. banc 1993). If any of these three prongs are absent, the motion court may deny an evidentiary hearing. Id.

3. Analysis

Appellant in this case failed to plead facts in his Rule 29.15 motion to show that Russell Howard was available to testify and that Russell Howard would have testified as he did at appellant’s first trial. This Court has ruled that “[t]o prevail on a claim of ineffective assistance of counsel due to counsel’s failure to call a witness to testify, the movant must show that the witness would have testified if called and that such evidence would have provided a viable defense.” White v. State, 939 S.W.2d 887, 893 (Mo. banc 1997), cert. denied 522 U.S. 948 (1997), *quoting* State v. Johnson, 901 S.W.2d 60, 63 (Mo. banc 1995). Further, appellant must show “specifically” that the witnesses were available to testify, that they would have testified if available, what the witness would have testified to, and that trial counsel was informed of their existence. Morrow v. State, 21 S.W.3d 819,

824 (Mo. banc 2000), cert. denied 121 S.Ct 1140 (2001); State v. Jones, 979 S.W.2d 171, 186-87 (Mo. banc 1998), cert. denied 525 U.S. 1112 (1999).

In this case, appellant failed to plead facts to show that witness Russell Howard was available to testify in either in his *pro se* motion or his amended motion. *See* PCR L.F. 17-18, 19-21. Appellant likewise has failed to plead facts to show that Russell Howard would have testified in the same manner as at appellant's first trial if he would have been available. Id. Appellant in his brief before this Court apparently concedes this point by focusing his inquiry on the "implicit" statements in his Rule 29.5 motion. *See* Appellant's Substitute Brief at 40-41. This concession is fatal to his argument based on this Court's rulings in Morrow, Jones, White, and Johnson. Appellant therefore cannot gain relief because he has not pled specific facts to establish that his witness was available to testify and that he would have testified as in appellant's first trial. *See* State v. Brooks, 960 S.W.2d 479, 497-98 (Mo. banc 1997), cert. denied 118 S.Ct. 2379 (1998). For this reason alone, appellant cannot prevail on this point.

In an attempt to excuse these pleading deficiencies, appellant asks this Court to "assume" that witness Russell Howard would testify as he did in appellant's first trial. App. Sub. Br. at 41. Appellant further asks this Court to find that pleading requirements can be "inferred" from an amended motion. Id. Appellant's request should be denied because this Court has repeatedly ruled against appellant's position.

This Court has consistently stated that Missouri is a fact-pleading state. State v. Harris, 870 S.W.2d 798, 815 (Mo. banc 1994), cert. denied 513 U.S. 953 (1994). This

Court has also held that Rule 29.15 is consistent with a fact-pleading regime. Id. This Court further explained the need in this State to plead facts in a Rule 29.15 motion and a prohibition against inferring facts from the petition by stating that “[t]he redundant requirement to plead facts makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.” White v. State, 939 S.W.2d 887, 893 (Mo. banc 1997), cert. denied 522 U.S. 948 (1997).

This Court in White then explained at length why fact pleading, especially in the Rule 29.15 context, is so essential to the judicial process.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. See Fields v. State, 572 S.W.2d 477, 483 (Mo. banc 1978). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. For that reason, it has been held that no evidentiary hearing will be required unless the motion meets three

requirements: “(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant.” State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993).

White, *supra*, at 893. As this Court stated, requiring fact pleading in the Rule 29.15 setting is necessary in order to bring finality to the judicial process and ensure that judicial resources are spent on claims that actually require a hearing, not on vague claims that if properly pled would spare the courts and counsel time and energy.

These principles are just as true today as they were in at the time that this Court decided White. Fact pleading places the burden of establishing facts for a claim on the moving party. Requiring the moving party to establish facts saves the courts valuable time because they do not have to conduct hearings into claims without a factual basis. In the Rule 29.15 context, fact pleading requires the movant to establish the facts of his petition through investigation so that the court can make a decision about whether a hearing is necessary in order to better manage the court’s time and resources. Appellant has not stated any rationale for changing the fact pleading requirement, and no reasonable rationale exists in light of this Court’s pronouncements in White, Morrow, and Harris. Therefore, appellant’s point should be denied.

Appellant relies solely on State v. Colbert, 949 S.W.2d 932 (Mo.App., W.D. 1997), for legal support for the proposition that facts can be inferred from an otherwise bare

record. App. Sub. Br. at 41-42. In Colbert, the appellant did not plead facts to show that the trial court would have accepted his guilty plea, and the Court of Appeals excused appellant's pleading deficiency by stating that "[f]rom this allegation of prejudice, we find it is implicit that the appellant is alleging that the trial court would have accepted the plea agreement."

Id. The "implicit" language in Colbert is simply contrary to the fact pleading requirement repeatedly set forth by this Court in White, Brooks, Harris, Morrow, Jones, and Johnson.

As discussed above, this Court requires that petitioners plead specific facts to show prejudice. *See* White, 939 S.W.2d at 893. Therefore, the Court of Appeal's reasoning is contrary to the previous decisions of this Court and appellant cannot rely on Colbert.

Appellant's point therefore must fail.

II.

THE TRIAL COURT DID NOT CLEARLY ERR IN DENYING, WITHOUT AN EVIDENTIARY HEARING, APPELLANT’S 29.15 MOTION ALLEGING THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE ISSUE OF THE RELEVANCY OF WITNESS AMY FIELD’S STATEMENTS CONCERNING BULLETS FOUND IN THE CAR APPELLANT USED IN THE SHOOTING BECAUSE THIS CLAIM IS NOT COGNIZABLE IN A RULE 29.15 MOTION IN THAT HE IS NOT CHALLENGING THE FUNDAMENTAL FAIRNESS OF HIS TRIAL.

FURTHER, APPELLANT’S CLAIM FAILS BECAUSE ANY OBJECTION WOULD HAVE BEEN MERITLESS IN THAT THE STATEMENTS WERE ADMISSIBLE.

Appellant contends that he should have received an evidentiary hearing on his claim that counsel was constitutionally ineffective for failing to preserve the issue of the relevancy of the testimony of State’s witness Amy Fields concerning bullets found in her car, thus causing the Court of Appeals to review under a “plain error” standard instead of a more lenient “abuse of discretion” standard (App. Sub. Br. 43-44). Appellant claims that if counsel had properly objected, “the results of his appeal would have been different” (App.Br. 44).

1. The motion court’s ruling

The motion court ruled as follows concerning this point.

Regarding movant's allegation in his amended motion that trial counsel was ineffective for failing to object to testimony, the Court finds that it is a presumption that a failure to object to a line of testimony is trial strategy.

Notwithstanding trial strategy, counsel's failure to make a meritorious objection does not, in itself, demonstrate incompetence. There must be a showing that counsel's overall performance fell below established norms and that this incompetence affected the result. Movant's allegations, even if true, do not rise to the level of incompetence on the part of trial counsel.

Furthermore, movant has failed to prove by a preponderance of the evidence that counsel's deficient performance prejudiced the movant so as to create a reasonable probability that the result of the trial would have been different.

Therefore, the above allegations fall into the category of "procedural default" and preclude movant from relief. Accordingly, the point is overruled.

(PCR L.F. 34, internal citations omitted).

2. Standard of Review

To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two pronged Strickland test. Appellant must show that counsel failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise in similar circumstances, and that he was prejudiced as a result. State v. Link, 25 S.W.3d 136,

149 (Mo. banc 2000), cert. denied 531 U.S. 1040 (2000), citing State v. Clay, 975 S.W.2d 121, 135 (Mo. banc 1998), cert. denied 525 U.S. 1085 (1999) and Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prove prejudice, appellant must show that there is a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” Link, supra, at 149, quoting State v. Ervin, 835 S.W.2d 905 (Mo. banc 1992), cert. denied, 507 U.S. 954 (1993). A reasonable probability under Strickland is “a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

In a case where appellant challenges the denial of an evidentiary hearing, appellant must meet an additional burden. “In order to be entitled to an evidentiary hearing, a movant must 1) cite facts, not conclusions, which, if true, would entitle movant to relief; 2) the factual allegations must not be refuted by the record; and 3) the matters complained of must prejudice the movant.” State v. Blankenship, 830 S.W.2d 1, 16 (Mo. banc 1993). If any of these three prongs are absent, the motion court may deny an evidentiary hearing. Id.

3. Analysis

A. Appellant’s claim is not cognizable in a Rule 29.15 motion

Appellant claims that he was prejudiced because his counsel failed to preserve the issue of whether Amy Fields’ testimony about the bullets was relevant and admissible. App.

Sub. Br. 43-44. Claims such as the one appellant brings in this case are not cognizable in Rule 29.15 proceedings. State v. Fears, 991 S.W.2d 190 (Mo.App., E.D. 1999); State v. Yates, 925 S.W.2d 489, 491 (Mo.App., E.D. 1996); State v. Lay, 896 S.W.2d 693, 702 (Mo.App., W.D. 1995); State v. Baker, 850 S.W.2d 944, 950 (Mo.App., E.D. 1993); State v. Loazia, 829 S.W.2d 558, 569-70 (Mo.App., E.D. 1992); Kirk v. State, 778 S.W.2d 661, 662 (Mo.App., E.D. 1989). Review of claims under Rule 29.15 is limited to a consideration of errors which denied appellant a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Fears, *supra*; Yates, *supra*; Lay, *supra*; Baker, *supra*; Loazia, *supra*; Kirk, *supra*.

The language of Strickland is particularly appropriate in this case. Strickland states repeatedly that the “Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.” Strickland, 466 U. S. at 684, *citing* Powell v. Alabama, 287 U.S. 45, 52 S.Ct. 55, 77 L.Ed.2d 158 (1932), Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938), and Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Strickland Court then stated that the attorney’s role is necessary “to ensure that the trial is fair.” Strickland, 466 U.S. at 685. Further, the Court stated that the purpose of the Counsel Clause is to “ensure a fair trial.” Id. at 686. Finally the Court stated that “the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. Strickland

thus teaches that the focus of any ineffectiveness inquiry must be the fairness of the trial itself.

In the case at bar, respondent notes that appellant is *not* claiming that counsel was ineffective for failing to object. While this Court has held that ineffective assistance of counsel for failure to object for the purpose of excluding evidence from a trial is cognizable in a Rule 29.15 proceeding (*see*, for example, State v. Nunley, 923 S.W.2d 91, 925 (Mo. banc 1996), cert. denied 519 U.S. 1094 (1997)), in the case at bar, however, appellant presents a *different* claim. Appellant here claims that counsel is ineffective for failing to preserve a point for appellate review in order to gain a more advantageous standard of review. These two claims are distinct.

Failing to object to inadmissible evidence for the purpose of excluding the evidence may directly affect the result of a trial, but the failure to preserve a claim for appeal does not address at all the impact at trial, but only affects the impact on appeal. An allegation of failure to preserve a claim therefore can result in no prejudice at trial to the defendant and thus cannot attack the fairness of the trial itself. As Strickland's emphasis is on the fairness of the *trial*, failure to preserve does not affect this fairness and thus is not a valid claim under Strickland. For this reason, the Missouri Court of Appeals' rulings in Fears, Yates, Lay, Baker, Loazia, and Kirk are correct and this Court should affirm the reasoning in those cases and apply that reasoning to this case by holding that appellant's claim that counsel failed to preserve a point for appellate review is not cognizable in a Rule 29.15 motion.

B. Witness Amy Fields' testimony about finding bullets in her car was admissible

Even assuming for the sake of argument that appellant's claim is cognizable in a Rule 29.15 motion, appellant has not plead facts that would entitle him to relief because the testimony about the bullets was admissible. The following testimony about the bullets was adduced at trial from State's witness Amy Fields.

Q. Did you ever find anything unusual in your car after that night that Mr.

Wilkes took your car on the 1st?

A. Yes.

Q. What was it that you found?

A. I found some bullets.

Q. Where were these bullets found?

A. In the glove compartment.

Q. How would you describe those bullets?

A. I didn't really look at them all that well. I opened my glove compartment and saw them, because I cleaned my car out the next day. I just kind of noticed them laying there. There was two of them and I couldn't tell you if they were full bullets, if they were shot. I don't know. I looked at them and kind of like, huh, and closed the thing.

Q. Do you remember giving a statement to the police describing them as medium-size bullets?

A. Uh-huh.

Q. Is that correct?

A. That's correct.

Q. I show you what's been marked as State's Exhibit 30. As far as the bottom of the bullet, does that look familiar to you?

A. The color and about the size and shape.

Q. Size and shape?

A. The color and probably the length.

Q. Okay. And State's Exhibit No. 40, which is a top of a bullet, does that look familiar to you?

A. I mean - - yeah.

Q. If you put those together, stuck them in there, two of them together?

A. Yeah. The color, I can definitely say it was those colors.

Q. And size?

A. Approximately that size.

Q. All right. Did you have any discussion with Mr. Wilkes about the bullets that you saw in the car?

A. Yeah. I think I asked him about them.

Q. What did he tell you about them?

A. He said he didn't know what I was talking about.

(Tr. 394-396).

For evidence to be admissible, it must be relevant, logically tending to prove or disprove a fact in issue or corroborate relevant evidence that bears on the principle issue.

State v. Woods, 984 S.W.2d 201, 205 (Mo.App., W.D. 1999); see also State v. Weaver, 912 S.W.2d 499, 510 (Mo. banc 1995), cert. denied, 519 U.S. 856 (1996). In addition, evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Wayman, 926 S.W.2d 900, 905 (Mo.App., W.D. 1996).

Fields' testimony was relevant because it corroborated other relevant evidence which bore on a principle issue in the case: whether Edward Wilkes was the shooter. "The law is well settled that evidence is relevant when it shows that the accused owned, possessed or had access to tools, implements or any articles with which the particular crime was or might have been committed, and that he owned or had such weapons in his possession prior to or shortly after the commission of the crime." State v. Williams, 922 S.W.2d 845, 852 (Mo.App., E.D. 1996). Evidence that Fields found 2 nine-millimeter (9 mm) bullets in her car the day after the offense was relevant to show that appellant had access to the same caliber bullets as were used to kill Kenneth Moore and seriously injure Gary Singleton.

The evidence adduced at trial established that appellant picked up Fields' car, a sky blue Ford Escort, in Topeka about 5:30 or 6:00 p.m. on February 1, the evening the shooting occurred (D.Tr. 385-387). At approximately 10:30 p.m., after the shooting occurred, Gary Singleton, observed appellant get into a sky blue Ford Escort (D.Tr. 189, 197, 222-223, 282). Shortly thereafter, after police arrived at the crime scene, a 9mm

bullet fell out of Singleton's back (D.Tr. 199, 229, 368). A spent 9 mm bullet was recovered during the autopsy from the head of Kenneth Moore (D.Tr. 358, 368). Both bullets were 9mm copper jacketed bullets which were fired from the same gun (D.Tr. 369). A spent 9mm casing was recovered from Moore's car (D.Tr. 339). Appellant called Fields from Kansas City about 2:30 a.m. on February 2 (D.Tr. 388-389, 392-393). Appellant returned in Fields' car to Topeka at approximately 4:15 a.m. (D.Tr. 394). The next day, Fields found two bullets in her car which were similar in color and length to the bullets recovered at the scene (D.Tr. 395-396).

This evidence tends to show that appellant was in possession of or had access to bullets which were similar to the bullets which killed Kenneth Moore and seriously injured Gary Singleton prior to or shortly after the commission of the crime. See State v. Butler, 951 S.W.2d 600, 604 (Mo. banc 1997) (Bullets found in appellant's apartment similar to bullets that killed appellant's wife); State v. Woodworth, 941 S.W.2d 679, 689 (Mo.App., W.D. 1997) (Jury could reasonably infer that stolen bullets were used in the crime from evidence that bullets taken from machine shed on night of attack had similar characteristics to those used in shooting). Therefore, this evidence is relevant.

Because this evidence is relevant, it is admissible. If counsel had objected to this evidence, his objection would have been without merit. Failing to make a meritless objection does not rise to the level of ineffective assistance of counsel. State v. Clemons, 946 S.W.2d 206, 227 (Mo. banc 1997), cert. denied 522 U.S. 968 (1997). Therefore, appellant cannot prevail on this ground and appellant's second point therefore must fail.

CONCLUSION

For the foregoing reasons, respondent prays that this Court affirm the judgment of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using Norton Anti-virus software, and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this ____ day of _____, 2002, to:

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Respondent's Appendix